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No. 03-1366

Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID J. GALLO,

Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court refuse to grant a writ of certiorari where Petitioner has not shown that the decision entered by the Court of Appeals in this case is in conflict with either decisions by any other Court of Appeals or relevant decisions of this Court?

2. Was Local Rule 1.5 of the United States District Court for the District of Arizona, as amended on September 15, 1999, constitutional as applied to Petitioner?

3. Should this Court refuse to grant a writ of certiorari where Petitioner has not shown that the decision entered by the Court of Appeals calls for an exercise of this Court's supervisory power?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is David J. Gallo, an individual. Respondent is the United States District Court for the District of Arizona.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (the "Court of Appeals") is reported at 349 F.3d 1169 and is found at page 1a of the Petitioner's Appendix ("Pet. App."). The unreported ruling of the United States District Court for the District of Arizona (the "District Court") is found in Pet. App. at page 33a.

JURISDICTION

The Court of Appeals entered its decision on November 19, 2003. The Court of Appeals denied Petitioner's petition for rehearing *en banc* on December 31, 2003. Petitioner timely filed his Petition for Writ of Certiorari ("Pet. Br.") on March 24, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves 28 U.S.C. § 2071, which provides, in pertinent part, that "all courts established by Acts of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."

This case also involves Local Rule 1.5(a) of the United States District Court for the District of Arizona, which provides, in pertinent part, that "[a]dmission to and continuing membership in the bar of this Court is limited

to attorneys who are active members in good standing of the State Bar of Arizona . . ."

STATEMENT OF THE CASE

On July 28, 1995, Petitioner David J. Gallo (hereinafter "Gallo") was admitted to practice generally before the United States District Court for the District of Arizona (the "District Court"), by virtue of his membership in the bar of another District Court. (Pet. Br. at 2)

On September 15, 1999, the District Court revised its Local Rule 1.5(a) so that, henceforth, the roster of attorneys admitted to practice generally before it would be restricted to attorneys who were members in good standing of the State Bar of Arizona. (Pet. App. at 2a) Before revising Local Rule 1.5(a), the District Court posted public notice of the proposed changes on its Web site, and held public hearings upon prior notice regarding the rule change. (Appendix of Respondent the United States District Court for the District of Arizona [hereinafter cited as "Dist. Ct. App."] at 23a-29a) After the District Court amended Rule 1.5(a), it again posted the revisions on its Web site, noted the revisions on all of its coversheets transmitting its judges' orders and judgments, and posted the revisions at its two courthouses. (*Id.*)

As Gallo was not a member of the State Bar of Arizona, the District Court's revision to its Local Rule prevented him from appearing generally before the District Court after September 15, 1999. Gallo claims not to have received proper notice of the proposed revisions. (Pet. Br. at 4) Nonetheless, Gallo concedes that he was aware of the changes to Local Rule 1.5(a) by May 2000, when he read

that rule before he filed the underlying action, encaptioned *Bartlett v. Arthur Andersen, L.L.P.*, Arizona District Court Case No. CV-00-0852-PHX-SMM ("the Baptist Foundation suit") (Pet. Br. at 4). Despite his awareness of the revision, Gallo filed the Baptist Foundation suit in the District Court and appeared before the District Court for several months because he believed revised Local Rule 1.5(a) was unconstitutional and thus inapplicable to him. (Pet. Br. at 4-5)

On September 1, 2000, the District Court sent Gallo a letter advising him that he was not admitted to practice generally before the District Court and that he could not continue to appear generally before the District Court. (Pet. Br. at 5) In response, Gallo requested that the District Court confirm that he was still admitted to practice generally before it, and, in the alternative, applied to appear *pro hac vice*. (Pet. Br. at 5-6) On October 2, 2000, the District Court issued an Order granting Gallo's application for admission *pro hac vice*, but informing Gallo that he was no longer admitted to practice generally before the District Court. (Pet. Br. at 7) Gallo represented his clients *pro hac vice* throughout the balance of the Baptist Foundation suit. (*Id.*) On February 19, 2002, after the conclusion of that suit, Gallo appealed the District Court's October 2, 2000 Order to the Court of Appeals for the Ninth Circuit. (Dist. Ct. App., *infra*, at 1a)

On November 19, 2003, the Court of Appeals held that the District Court's October 2, 2000 Order was not a disbarment of Gallo, but rather a denial of his application for a waiver of the Local Rules. (Pet. App. at 11a) The Court of Appeals also held that Local Rule 1.5(a), and the District Court's notice of the proposed changes to the rule, denied Gallo neither substantive nor procedural due

process. (Pet. App. at 13a-23a) On December 31, 2003, the Court of Appeals denied Gallo's request for rehearing *en banc*. (Pet. App. at 32a) Gallo now seeks the intervention of this Court.

ARGUMENT

I. THIS COURT SHOULD NOT ISSUE THE WRIT, AS GALLO HAS FAILED TO SHOW EITHER CONFLICT AMONG THE COURTS OF APPEAL OR CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND ANY DECISION OF THIS COURT.

A. Neither the Decision of the Court of Appeals, Nor the District Court's Decision To Enact Revised Local Rule 1.5(a), Conflict With Any Decision of Any Other Court of Appeals.

One major function of this Court is to resolve conflicts between the Courts of Appeal. *E.g., Boeing Co. v. United States*, 537 U.S. 437, 446 (2003); SUP. CT. R. 10. In this case, however, Petitioner has pointed to no such conflict among the Courts of Appeal as to the propriety of rules such as Local Rule 1.5(a), for there is none. For this reason, this is no case for certiorari.

The harmony between Local Rule 1.5(a) and the rules of many other District Courts also shows that there is no conflict within the federal courts requiring this Court's attention. As both the Court of Appeals and Gallo himself recognize, many District Courts require membership in the bar of the state in which they sit as a prerequisite to admission to practice before those courts. (*See* Pet. App. at 13a (The Court of Appeals: "amendments to [Local Rule

1.5(a)] are similar to laws adopted by the majority of federal district courts"); Pet. Br. at 15 (Gallo: "Numerous district courts currently impose" a requirement of state bar membership as a prerequisite to admission)).

In fact, no less than *fifty-seven* District Courts, situated within nine Circuits, have adopted rules like Local Rule 1.5(a).[1] Petitioner has not pointed to any Court of Appeals that has struck down any of the above rules, nor is the District Court aware of any Court of Appeals having done so. In short, there is no conflict between the Courts of Appeal or even among the District Courts that this Court need resolve. This Court should not issue the writ.

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[1] *See, e.g.*, M.D. Ala. L.R. 83.1; N.D. Ala. L.R. 83.1; S.D. Ala. L.R. 83.5; D. Alaska L.R. 83.1; C.D. Cal. L.R. 83-2.2.1; E.D. Cal. Gen. R. 83-180(a); N.D. Cal. Civ. R. 11-1(b); S.D. Cal. Civ. R. 83.3; D. Del. L.R. 83.5; M.D. Fla. Gen. R. 2.01; N.D. Fla. Gen. R. 11.1; S.D. Fla. Special Rules Governing Admission and Practice of Attorneys, Rule 1; M.D. Ga. L.R. 83.1.1; N.D. Ga. Civ. L.R. 83.1; S.D. Ga. Civ. L.R. 83.2; D. Haw. L.R. 83.1; D. Idaho Civ. R. 83.4; N.D. Iowa Civ. R. 83.2; S.D. Iowa Civ. R. 83.2; E.D. Ky. L.R. 83.1; W.D. Ky. L.R. 83.1; E.D. La. L.R. 83.2.2E; M.D. La. L.R. 83.2.2M and W; W.D. La. L.R. 83.2.2M and W; D. Me. Civ. R. 83.1; D. Mass. L.R. 83.5.1; D. Minn. L.R. 83.5; N.D. Miss. L.R. 83.1; S.D. Miss. Unif. L.R. 83.1; D. Mont. L.R. 83.3; D. Nev. L.R. IA 10-1; D.N.H. L.R. 83.1; D.N.J. Civ. R. 101.1; D.N.M. L.R.-Civ 83.2; Local Civil Rule 83.1, EDNC; M.D.N.C. Civ. R. 83.1; W.D.N.C. L.R. 83.1; S.D. Ohio Civ. R. 83.3; D. Or. L.R. 83.2; E.D. Pa. L.R. 83.5; M.D. Pa. L.R. 83.8; D.R.I. L.R. 4(b)(1); D.S.C. L. Civ. R. 83.1.02; D.S.D. L.R. 83.2; M.D. Tenn. L.R. 1(b); D. Utah Civ. R. 83-1.1; E.D. Va. L. Civ. R. 83.1; W.D. Va. Standing Order III(B)(1); E.D. Wash L.R. 83.2; W.D. Wash GR 2(b); N.D. W. Va. L.R. Gen. P. 83.01; S.D.W. Va. L.R. Gen. P. 2.01; U.S.D.C. L.R. 83.12.2 (Wyo.); D. Guam Gen. R. 17.1; D.N. Mar. I. L.R. 83.5; D.V.I. L.R. 83.1.

B. The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court.

Gallo's suggestion that the decision of the Court of Appeals conflicts with two Civil War-era decisions of this Court fails badly. Gallo grounds his argument in *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505 (1873) and *Ex Parte Garland*, 71 U.S. (4 Wall.) 373 (1866), which he contends stand for the proposition that no attorney may be removed by a District Court from its membership rolls absent attorney misconduct. (Pet. Br. at pp. 11-15) Gallo even goes so far as to argue that this Court has held, in *Robinson* and *Garland*, that attorneys licensed to practice before the federal bar have "life tenure" that cannot be revoked so long as the attorneys display "good behavior." (*Id.*)

Gallo's reliance upon *Robinson* is misplaced, because that case is wholly distinguishable from the case at hand. In *Robinson*, this Court addressed the propriety of punishing a lawyer for contempt by removing him from a District Court's membership rolls. *See Robinson*, 86 U.S. at 510-11. The *Robinson* Court determined that the removal was not authorized by the Judiciary Act of 1789, which limited punishment for contempt to fines or imprisonment, and held that, while District Courts have the inherent power to punish for contempt, that power may only be exercised after notice of charges of misconduct and an opportunity to be heard. *See id.* at 512. Gallo's case, unlike *Robinson*, is one in which there is neither a contempt nor a punitive or disciplinary act taken against counsel.

Gallo's citation of *Garland* likewise misses the mark. That case too involved punishing lawyers -- specifically, Congress' attempt to prohibit all who had aided the Confederacy from practicing in the post-Civil War federal

courts. *See Garland*, 71 U.S. at 378. The *Garland* Court struck the law down as an unconstitutional ex post facto law, a bill of attainder, and an infringement upon the President's Article II power to pardon former Confederates. *See id.* at 379. The Court also held that Congress did not have the power to regulate a fundamentally judicial function – the admission or exclusion of particular attorneys to the practice of law. *Id.* at 378-79. Gallo's case, which is utterly unlike *Garland*, does not involve either an ex post facto law, a bill of attainder, or the subversion of Presidential action.

Gallo's analysis of both *Robinson* and *Garland* is fundamentally flawed because in this case, unlike those Civil War-era cases, the District Court in no way sought to punish him, or even to exclude him from practicing before it. Instead, the District Court merely exercised its rule-making authority under Section 2071, which changed the manner of Gallo's continued appearance to *pro hac vice*. Despite Gallo's hyperbole, the District Court's action in amending Local Rule 1.5(a) was in no way an "*en masse* disbarment." A lawyer is *disbarred* for serious misconduct, after which the lawyer is precluded from any form of legal practice in the court from which he or she was disbarred. *E.g.*, BLACK'S LAW DICTIONARY 463 (6th ed. 1990) (defining disbarment as an "[a]ct of court in suspending attorney's license to practice law. A disbarment proceeding is . . . disciplinary in nature . . . "); *Ex Parte Wall*, 107 U.S. 265, 273 (1882) (stating that disbarment is a sanction for "gross cases of misconduct."); *In re Sealed Appellant*, 194 F.3d 666, 674 (5th Cir. 1999) ("Disbarment is generally appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously, adversely reflects on the attorneys' fitness

to practice."); SUP. CT. R. 8 (providing for disbarment where a member of the bar of the Court has either been disbarred from practice before any other court, or "has engaged in conduct unbecoming a member of the Bar of this Court."). Here, there is neither punishment nor a suggestion of wrongdoing. There is only quintessential Section 2071 rulemaking – administrative action which is not discipline, not punishment, and not an injury to any substantive right of Gallo or his clients. *Robinson* and *Garland* are inapposite.

Gallo wishfully argues that the reference in *Robinson* to attorneys maintaining their bar membership during "good behavior" makes attorneys admitted to the bar of a District Court constitutionally unremovable except for misconduct. (Pet. Br. at 11-13) Gallo reasons that, because Article III of the United States Constitution makes federal judges life tenured during their "good behavior," this Court's use of the phrase "good behavior" in *Robinson* somehow elevated counsel to the status of Article III officers. (Pet. Br. at 11-12, *citing* 86 U.S. at 512) Gallo's bootstrap fails badly. *Robinson* does not describe lawyers as Article III officers, nor does Article III mention lawyers, though it expressly refers to judges. *See generally Robinson*, 86 U.S. at 512; *see also* U.S. CONST. art. III, § 1. Put another way, the presence of an enumerated right in the United States Constitution makes it a constitutional right. The mere description of a privilege by use of a word or phrase which also happens to appear in the United States Constitution does not.

For each of these reasons, Gallo has failed to establish a conflict between *Robinson* or *Garland* and the decision of the Court of Appeals. This Court should not issue the writ.

II. LOCAL RULE 1.5(a) IS A LEGITIMATE EXERCISE OF THE DISTRICT COURT'S RULEMAKING AUTHORITY, AND IS CONSTITUTIONAL AS APPLIED TO GALLO.

A. Congress Authorized the District Court To Promulgate Local Rule 1.5(a) By Enacting 28 U.S.C. § 2071.

It is beyond question that the District Court has broad authority to regulate practice before it, including the authority to regulate the rolls of attorneys who are admitted to practice before it. *See* 28 U.S.C. § 2071. Section 2071 provides that "all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." *Id.* Section 2071 authorizes the enactment of *any* local rule that does not conflict with an identified statute or Federal Rule of Civil Procedure. *See* 28 U.S.C. § 2072.

Rules like Local Rule 1.5(a), authorized by Section 2071, are the means by which our District Courts assure themselves of the continued good behavior and character of the attorneys who practice before them. *See, e.g., Giannini v. Real*, 911 F.2d 354, 360 (9th Cir. 1990); *see also In re G.L.S.*, 745 F.2d 856, 859 (4th Cir. 1984); *In re Sutter*, 543 F.2d 1030, 1036 (2d Cir. 1976); *In re Abrams*, 521 F.2d 1094, 1099 (3d Cir. 1975); *Sanders v. Russell*, 401 F.2d 241, 245-46 (5th Cir. 1968).

As the Ninth Circuit stated in *Application of Wasserman*:

> In view of the notorious fact that lawyers whose qualities or acts have made them persona non

> grata in one state where they have been admitted to the courts, tend to migrate to another state where they are not as well known, the individual courts are faced with a tremendous problem in screening applicants for admission.

270 F.2d 213, 216 (9th Cir. 1956).

As the District Courts do not have their own administrative mechanisms by which to supervise and regulate ethics, local rules like Local Rule 1.5(a) provide some assurance, through the adopted mechanisms of the forum state's bar, of ethical behavior by admitted attorneys. This is a function that this Court recognized as long ago as 1866 that the federal courts must undertake. *Garland*, 71 U.S. at 379. Local Rule 1.5(a) serves that important goal.

While Gallo questions the retroactive application of amended Local Rule 1.5(a), that application is authorized by Section 2071. Section 2071 specifically states that rules created by the District Court under its auspices "shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order." 28 U.S.C. § 2071(b). In other words, Section 2071 empowers a District Court to choose whether to apply the rules it fashions to matters already in progress, such as ongoing cases or attorney admissions previously granted. *See id.*

Case law construing Section 2071 confirms that the section empowers district courts to fashion rules that affect prospectively how a lawyer conducts a case and how a lawyer appears before the court. In *Ma v. Community Bank*, 686 F.2d 459 (7th Cir. 1982), a New York resident litigating a case in the Eastern District of Wisconsin was ordered by the Wisconsin court, after the litigation had

commenced and consistent with the Wisconsin court's local rules, to retain local counsel. The Seventh Circuit upheld the order and the local rule as a proper exercise of the District Court's discretion under Section 2071. *See id.* at 470-71.

The District Court's application of Local Rule 1.5(a) to Gallo is thus fully consistent with Section 2071 and case law interpreting it. This Court should not issue the writ.

B. The District Court's Amendment to Local Rule 1.5(a) in No Way Deprived Gallo of Substantive Due Process.

While Gallo rightly notes that he has a property interest in his license to practice law, the District Court's amendment of Rule 1.5(a) in no way violated his right to substantive due process. As the Court of Appeals stated in this case, "a retroactive licensing scheme not affecting fundamental rights will pass scrutiny if the scheme bears 'a rational relationship to a legitimate state interest.'" (Pet. App. at 14a) (quoting *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000)). This analysis applies to the regulation of admissions to a state bar. *See Schware v. Bd. of Bar Exam'rs of State of N.M.*, 353 U.S. 232, 239 (1957) (holding that state bar qualifications must be rationally connected to the applicant's "fitness or capacity" to practice law). Rule 1.5(a), which bears well more than the required "rational relationship to a legitimate state interest," easily passes constitutional muster.

The legitimate interest served by tying general admission to a District Court to membership in that District Court's state bar is the enhanced regulation of the

fitness of attorneys. *See Giannini*, 911 F.2d at 360. (*See also* Pet. App. at 18a-19a) There can be no serious dispute that regulating the fitness of a District Court's admittees is a legitimate interest, given that Congress has charged the District Court with the task of regulating the admission of the attorneys who practice before it. 28 U.S.C. § 2071. The only question is whether Rule 1.5(a) is rationally related to that interest.

A recent decision of the Ninth Circuit illustrates why Rule 1.5(a) is rationally related to that legitimate interest. In *Russell v. Hug*, 275 F.3d 812 (9th Cir. 2002), the Ninth Circuit upheld an order of the District Court for the Northern District of California requiring private attorneys who represented indigent defendants to be members of the California State Bar. The Ninth Circuit found the rule to be rationally related to the same legitimate interest at the heart of Rule 1.5(a), finding that the challenged order made discipline easier for that District Court by giving the Court recourse to the California bar's disciplinary mechanism. *Id.* at 820. Especially because the District Courts generally lack the extensive investment in and commitment to attorney regulation and discipline which is typically found in state bars, it is eminently rational for the District Courts to rely upon the greater regulatory resources of their state brethren to assure the fitness and character of would-be general admittees. (Pet. App. at 18a)

Another measure of the rationality of Local Rule 1.5(a) is empirical – the number of District Courts which have adopted like measures. As discussed in Section I of this brief, fifty-seven District Courts have gone down the same path as the respondent District Court, and adopted a rule requiring membership in the forum state's bar as a

prerequisite to practice before the District Court. *See supra* p. 5, n.1.

In this case, the Court of Appeals correctly held that Local Rule 1.5(a) "serves the legitimate interest of ensuring that all attorneys practicing before the [District Court] 'clear the standard required' by [the State Bar of Arizona]." (Pet. App. at 18a) (quoting *Russell*, 275 F.3d at 819). That rule well "serves the court's legitimate interest in simplifying the disciplinary process," permitting the District Court to simply make all disciplinary referrals to the Arizona State Bar, rather than to any of fifty state bars. (Pet. App. at 19a) Thus, as the Court of Appeals correctly held, Local Rule 1.5(a) does not violate substantive due process because "it is justified by the rational purpose of streamlining and perfecting the regulation of attorney admission in the Arizona District Court." *Id.*

Gallo's other attempts to minimize the legitimacy of the District Court's interest are likewise unavailing. He argues that, while membership in a state bar "may have the effect of ensuring some base level of familiarity" with the forum state's laws, such familiarity is only necessary in diversity cases. However, in so arguing, Petitioner completely ignores the effects of the rule that the Court of Appeals found important in this case – "streamlining and perfecting the regulation of attorney admission" in the District Court. (Pet. App. at 19a) Ensuring the character and fitness of the attorneys who practice before the District Court is a key purpose of the rule, not merely attempting to ensure that those attorneys are familiar with Arizona law.

Gallo also contends that requiring membership in the forum state bar may "deprive litigants of their choice of

counsel," but then recognizes that most District Courts, including the respondent District Court, permit admission *pro hac vice*. (Pet. Br. at 17) Gallo argues that admission *pro hac vice* is not "the equivalent of a license," and is thus an inadequate substitute for practicing generally before the court. (*Id.*) However, the Court of Appeals correctly stated that, while *pro hac vice* admission "may be construed as burdensome for the attorney as well as expensive for the client," the burdens imposed by appearing *pro hac vice* are outweighed by the District Court's legitimate interest in regulating the character and fitness of those who appear before it. (Pet. App. at 26a-27a)

Gallo's citation to *Snelling v. Radford*, 243 U.S. 46, 49 (1917), is not to the contrary. Gallo cites *Snelling* in support of his argument that the requirement of forum state membership might somehow be improper. (Pet. Br. at 16) *Snelling*, however, involved the question of whether this Court was required to disbar an attorney admitted to practice before it where the application was based upon an admission to practice in Michigan, which had been later revoked for immoral conduct. *See id.* at 48. Once again, this is not a situation in which a court removes an attorney from its rolls because of misconduct; thus, *Snelling* is inapposite.

Finally, while Gallo would question the propriety of requiring membership in the forum state's bar as a prerequisite to membership in a District Court's bar, he has failed to preserve this particular issue for appeal. In his brief to the Court of Appeals, Petitioner stated that he "does *not* question the power of a United States District Court to require admission to the bar of its forum state as a prerequisite to admission to practice before it." (*See* Dist. Ct. App., *infra*, at 14a) (emphasis added) Gallo thus

waived any right he may have had to question the propriety of requiring admission to the forum state's bar as a prerequisite to admission to a federal court's bar.

For all of these reasons, the District Court did not abridge Gallo's rights to substantive due process by applying Local Rule 1.5(a) to him, and this Court should not issue the writ.

C. The District Court Afforded Gallo Procedural Due Process By Providing the Public With Notice of the Proposed Amendment to Local Rule 1.5(a).

Gallo's argument that the enactment of Local Rule 1.5(a) somehow violated his right to procedural due process fails badly. *First*, as shown below, Gallo is wrong in asserting that he or similarly situated attorneys were entitled to mailed notice of the proposed revision of Local Rule 1.5(a). *Second*, the District Court provided several types of notice of the proposed change and held public hearings regarding the change, consistent with the requirements of due process.

1. Gallo's suggestion that the District Court was required to provide individual notice to each of its 6,796 prior admittees before amending Local Rule 1.5(a) is incorrect.

Gallo's first argument that the District Court violated his right to procedural due process is that, before amending Local Rule 1.5(a), the District Court was required to provide individual notice to each of the 6,796 attorneys previously admitted to practice before it, including him.

(Pet. Br. at 18-19). This argument fails, because the promulgation of Local Rule 1.5(a) was legislative in nature, because this Court's case law does not require mailed notice, and also because Local Rule 1.5(a)'s application to Gallo was not punitive in nature.

To understand why Local Rule 1.5(a) was legislative in nature, and thus required less prior notice than an adjudicative act, it is important first to examine the law defining legislative action. As the Court of Appeals stated, whether a party who is to be deprived of property "is entitled to individual notice and a pre-deprivation hearing depends upon the character of the action. When the action is purely legislative, the statute satisfies due process if the enacting body provides public notice and open hearings." (Pet. App. at 19a) (citing *Texaco v. Short*, 454 U.S. 516, 536 (1982); 28 U.S.C. § 2071(b)) In other words, where legislative action is taken that affects "more than a few people," individual notice of the law is not required. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). If the action is adjudicative, affecting a small number of persons, due process requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Londoner v. Denver*, 210 U.S. 373, 385 (1908).

As the Court of Appeals correctly stated, in order to determine whether an action is legislative, requiring no individual notice to affected persons, or adjudicative, requiring individual notice to affected persons, one must consider "whether the government action applies to specific individuals or to unnamed and unspecified persons," "whether the promulgating agency considers

general facts or adjudicates a particular set of disputed facts," and "whether the action determines policy issues or resolves specific disputes between particular parties." (Pet. App. at 20a) (citing *United States v. Fla. E. Coast R.R. Co.*, 410 U.S. 224, 244-46; *Harris v. County of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990), *Brown v. McGarr*, 774 F.2d 777, 780 (7th Cir. 1985)).

It is difficult to imagine an action to be taken by a District Court that was more purely legislative, or less adjudicative, than then amendment of Local Rule 1.5(a). Amended Local Rule 1.5(a) did not apply to specific persons, but rather to any and all attorneys currently practicing or prospectively practicing in the District Court. In promulgating the rule, the District Court was not intent on resolving a set of disputed facts, but rather considered the general facts of who should be admitted to practice before it. In addition, the promulgation of the rule did not resolve a specific dispute, but rather set policy for the court. For all of these reasons, the District Court's action was purely legislative. *See Texaco*, 454 U.S. at 536; *Bi-Metallic Inv. Co.*, 239 U.S. at 445.

Gallo's argument that he was owed advance notice of the revision fares no better. Gallo suggests that the "posting of notices in Arizona federal courthouses" was not "reasonably calculated" to apprise members of the federal bar of the proposed rule change. (Pet. Br. at 21) Gallo's argument that he should have received mailed notice of the proposed change because his address was known to the District Court is unpersuasive. (*See id.*) Gallo cites *Mullane*, *supra*, and to *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), incorrectly claiming that both cases stand for the proposition that due process always requires mailed notice where an address is known.

Gallo's citation to *Mullane* and *Mennonite Bd. of Missions* is unavailing, because those cases are easily distinguished from this one, and because he misstates them. *Mullane* involved a situation in which the *only* notice provided to trust beneficiaries of the judicial settlement of trust accounts was publication in a local newspaper. *See Mullane*, 339 U.S. at 307-09. The Court held that the dissemination of notice of the proceedings by newspaper publication *only* was insufficient. *See id.* at 314. *Mennonite Bd. of Missions* concerned the issue of whether published and posted notice to property owners of pending proceedings to sell their property for non-payment of taxes was sufficient. *See Mennonite Bd. of Missions*, 462 U.S. at 792. The Court held that, because the notices were designed to attract prospective buyers and because the property owners had *already* shown a proclivity to fail to take steps to protect their property, notice should have been provided by mail. *See id.* at 798-99.

The instant case, however, does not involve the fleeting publication of notice in a local newspaper, as in *Mullane*, or a small number of known property owners who have already failed to protect their property interests, as in *Mennonite Bd. of Missions*. This case involves a large group of attorneys – 6,796 – many of whom, like Petitioner, had never appeared before the District Court prior to the rule change, and many of whom, like Petitioner, lived out of state. Furthermore, Petitioner and the other similarly situated attorneys are not only presumed, but are in fact required, to be familiar with the rules of the courts before which they practice and to keep themselves informed of those rules and any changes thereto. *See, e.g.*, MODEL RULES OF PROF. CONDUCT R. 1.1.

In addition, neither *Mullane* nor *Mennonite Bd. of Missions* stand for the proposition that mailing is the only form of acceptable notice. In fact, in *Mullane*, the Court stated that, while personal service "within the jurisdiction is the classic form of notice always adequate in any type of proceeding," it "has not in all circumstances been regarded as indispensable to the process due residents, and it has more often been held unnecessary as to non-residents." *Mullane*, 339 U.S. at 313-14. In fact, the Court stated, a "construction of the Due Process Clause which would place impossible or impracticable obstacles in the way [of the party required to give notice] could not be justified." *Id.*

All that is required under *Mullane* is notice that: (1) "reasonably convey[s] the required information" and (2) "afford[s] a reasonable time for those interested to make their appearance." *Id.* at 314. In light of the cost of mailing notices of the rule change to every attorney ever admitted to practice generally before the District Court, the "ubiquity" of the Internet (Pet. Br. at 21), the duty imposed upon Gallo and all other attorneys to acquire and maintain familiarity with the rules of the courts before which they appear, and the *multiple* methods by which the District Court provided notice of the rule change, Gallo cannot reasonably contend that the District Court fell below the requirements of due process in providing notice of the rule change.

Gallo's argument that the District Court was required to mail notice to all previously admitted attorneys also suffers from a deficiency common to much of his petition, as he once again relies upon inapposite cases that addressed punishment of an attorney. (Pet. Br. at 19-20) The *McGarr* case, *supra*, which the Court of Appeals found "indistinguishable" from the instant case, illustrates why

Gallo's assumption that he was being punished by Local Rule 1.5(a) is wrong, and why the revision was valid. (Pet. App. at 20a) In *McGarr*, the Illinois District Court had promulgated a rule that required trial attorneys practicing before it to possess a certain level of trial experience and that essentially "revoked" the licenses of attorneys previously admitted to practice before the court who did not have sufficient experience. *See McGarr*, 774 F.2d at 779. The plaintiff contended, as does Gallo here, that the rule had "disbarred him;" however, the Seventh Circuit noted that disbarment is a penalty for misconduct by an individual attorney, while the rule in question was "adopted in response to fact finding that was not focused on individual attorneys." *Id.* at 780. The court therefore upheld the rule. *See id.*

As the Court of Appeals recognized in this case, Local Rule 1.5(a) did not "disbar" Gallo. The Court of Appeals' view on this subject is fully consistent with dictionary definitions of disbarment and cases construing that term. *E.g.*, BLACK'S LAW DICTIONARY 463 (6th ed. 1990) (disbarment is an "[a]ct of court in suspending attorney's license to practice law. A disbarment proceeding is . . . disciplinary in nature . . ."); *Wall*, 107 U.S. at 273 (disbarment is a sanction for "gross cases of misconduct."); *Sealed Appellant*, 194 F.3d at 674 ("Disbarment is generally appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously, adversely reflects on the attorneys' fitness to practice."); SUP. CT. R. 8. The revision to Local Rule 1.5(a) was not punitive but was instead regulation of the entire class of attorneys practicing before the District Court. Accordingly, Gallo was not entitled to individualized notice of the rule change. (Pet. App. at 22a)

2. The District Court's public notice and hearings on the revisions to Local Rule 1.5(a) satisfied due process.

Specific consideration of the District Court's public notices and public hearings concerning revised Local Rule 1.5(a) also shows that the District Court afforded Gallo any procedural due process he was owed.

On May 19, 1999, the District Court issued a Notice of Hearing advising that public hearings would be held regarding the rule change in both Phoenix and Tucson. (*See* Dist. Ct. App., *infra*, at 29a) On July 12, 1999, consistent with that notice, the Court received public comment on the proposed rules at these hearings. (*Id.*) Immediately after adopting the amended rule, the District Court: (1) posted notice of the amendments prominently on its Web site, www.azd.uscourts.gov, for at least six months; (2) posted notice of the amendment at the offices of the Clerk of the Court at both divisions of the District Court (Phoenix and Tucson); (3) mailed notice of the amendment to any out-of-state attorney admitted prior to September 15, 1999 who made a new appearance or requested a certificate of good standing; and (4) for over three months, placed a special notice of the amendment at the foot of every cover sheet used to transmit all orders and judgments to counsel of record. (Dist. Ct. App., *infra*, at 23a-27a) Under this Court's precedent, the District Court's provision of public notice and hearings is sufficient to afford Gallo the procedural due process owed to him. *See Texaco*, 454 U.S. at 536; *Bi-Metallic Inv. Co.*, 239 U.S. at 445. Gallo's claims fail.

III. PETITIONER GIVES THIS COURT NO REASON TO USE ITS "INHERENT SUPERVISORY POWER" TO INVALIDATE LOCAL RULE 1.5(a)

Petitioner asks that the Court exercise its supervisory power to invalidate Local Rule 1.5(a) and "reinstate" Petitioner and other similarly situated attorneys. (Pet. Br., at p. 22, citing *Frazier v. Heebe*, 482 U.S. 641 (1987)) As the Court of Appeals noted, however, in declining to exercise its own supervisory power to invalidate the rule, the supervisory power of a reviewing court "is not unbounded and may not be exercised absent a clear basis in fact and law." (Pet. App. at 31a) Petitioner has given this Court no basis in either fact or law to exercise that authority, and his request must fail.

This Court can exercise its supervisory powers "to ensure that . . . local rules are consistent with 'the principles of right and justice.'" *Frazier*, 482 U.S. at 645 (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1986) (White, J., concurring)). In *Frazier*, the Court chose to exercise its supervisory power to strike down a local rule that required attorneys who practiced before the District Court for the Eastern District of Louisiana to reside or keep an office in Louisiana. *See id.* at 646. The Court considered the fact that the attorneys in question had *passed* the Louisiana state bar, thus there was no reason to believe that they were less competent than other attorneys, and the fact that attorneys who were residents of Louisiana were *not* required to keep offices in the state. *See id.* at 646-47. Based upon the foregoing facts, the Court found the rule to be arbitrarily discriminatory and, accordingly, used its supervisory power to strike it down. *See id.* at 646.

In this case, however, Local Rule 1.5(a) is wholly "consistent with 'the principles of right and justice.'" *Id.*

As the Court noted in *Frazier*, under Section 2071, "a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. This authority includes the regulation of admission to its own bar." *Id.* at 645 (internal citations omitted). The District Court has done just what this Court has told the District Court it may do. It has implemented a rule that regulates admission to its bar, a rule that does not arbitrarily discriminate against out-of-state attorneys but rather, as the Court of Appeals correctly held, is rationally related to its legitimate interests in streamlining and administering its attorney rolls. Thus, an exercise in this case of this Court's supervisory power either to strike down Local Rule 1.5(a) or to reinstate Gallo and others like him would neither be warranted, nor consistent with *Frazier*.

CONCLUSION

This Court should deny Petitioner's Petition for a Writ of Certiorari because this case presents no conflicts among the Courts of Appeal or any important issues of law. The District Court's amendment to its Rule 1.5(a) was proper as a matter of law under Section 2071 and did not deprive Gallo of his right to substantive due process or procedural due process. Further, this Court should not exercise its supervisory authority to invalidate Rule 1.5(a).

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOMMIE L. BARTLETT, *et al.*, Plaintiffs, v. ARTHUR ANDERSEN, L.L.P., *etc., et al.*, Defendants.	Docket Number: **01-17332**
DAVID J. GALLO, Movant-Appellant, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, Real Party in Interest.	**APPELLANT'S BRIEF**

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Jurisdiction in the District Court

Title 28, U.S.C., Section 1331, conferred subject matter jurisdiction upon the District Court below. An additional basis for subject-matter jurisdiction is the inherent power of federal courts over attorney admissions to practice. *See, Chambers v. NASCO, Inc.*, 501 U.S. 32, 43; 111 S.Ct. 2123, 2132; 115 L.Ed.2d 27 (1991).

Jurisdiction in the Court of Appeals

Title 28, U.S.C., Sections [sic] 1291, confers subject matter jurisdiction upon this Court.

Dates Establishing Timeliness of Appeal

The interlocutory order on appeal **(hereinafter the "Order on Appeal")** was entered 2 October 2000. (*See,*

Order on Appeal, Docket Entry 56, reproduced at E/R 18-19.)[1] Arguably, the Order on Appeal constituted a "collateral order" which was immediately appealable of right. *See, Estate of Bishop v. Bechtel Power Corporation,* 905 F.2d 1272, 1274 (9th Cir. 1990) (explaining "collateral order" doctrine). However, even if the Order on Appeal *did* constitute a "collateral order" immediately appealable of right, Appellant, at his sole option, had the absolute right to defer perfection of the instant Appeal until after entry of final judgment. *See, Hook v. Arizona Department of Corrections,* 107 F.3d 1397, 1401 (9th Cir. 1997).

Final judgment **(hereinafter the "Final Judgment")** was entered 17 September 2001. (*See*, Final Judgment, Docket Entry 164, reproduced at E/R 20.) The Order on Appeal merged into the Final Judgment by operation of law. *See*, *Hook v. Arizona Department of Corrections*, *supra*, 107 F.3d at 1401. On 12 October 2001, Appellant timely perfected the instant Appeal by filing his Notice of Appeal. (*See*, Notice of Appeal., Docket Entry 169, reproduced at E/R 21-25; *cf.*: Rule 4 (a)(1), Fed.R.App.P.)

The Final Judgment is Final in Form

The Final Judgment is final in form, purporting to dispose completely of all claims of all parties. (*See*, Final Judgment, at E/R 20.)

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[1] References to "E/R" shall be to the Excerpts of Record. Where appropriate, page and line shall be indicated in the following format: "8:2" shall mean page 8, line 2; "8:2-21" shall mean page 8, lines 2 through 21; "8:2 to 9:16" shall mean page 8, line 2 through page 9, line 16.

ISSUES PRESENTED FOR REVIEW

Appellant presents the following issues for review:

Whether the District Court[2] erred in concluding that an amendment to the District Court's Local Rule 1.5 **(hereinafter "Rule 1.5")**, which limited " . . . continuing membership in the bar of [the District Court] . . . to attorneys who are active members in good standing of the State Bar of Arizona," operated to disbar Appellant, along with other affected attorneys who, like Appellant, were admitted to practice before the District Court prior to the effective date of the amendment, but who are not members of the State Bar of Arizona.

Whether the District Court erred in failing to conclude that, the absence of notice by mail of the disbarment proceedings offended Appellant's due process rights (and the due process rights of the other affected attorneys).

Whether this Court should exercise its supervisory power over the District Court to direct that Local Rule 1.5(a) shall be applied prospectively (but not retroactively so as to disbar previously-admitted counsel), so as to avoid the necessity of determining constitutional issues of great magnitude.

STATEMENT OF THE CASE

1. Nature of the Case

Appellant is an attorney who was engaged to represent the Plaintiffs in the underlying civil action. During

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[2] The Hon. Stephen M. McNamee, Chief United States District Judge for the District of Arizona.

the course of the underlying civil action, Appellant learned that the Clerk of the District Court had stricken Appellant's name from the roll of attorneys admitted to practice before said Court, and that the Clerk had done so without affording any notice to Appellant.

The instant Appeal is brought from an order (*i.e.*, the Order on Appeal) which determined that Appellant (along with other affected attorneys) had been lawfully disbarred from practice before the District Court by operation of an amendment to the District Court's Local Rule 1.5, which, as amended, purports to limit " . . . continuing membership in the bar of [the District Court] . . . to attorneys who are active members in good standing of the State Bar of Arizona."

2. **Course of Proceedings**

The underlying civil action was commenced in May of 2000. In August of 2000, Appellant was informed by the Clerk of the District Court that " . . . a review of our files indicates that you have not been admitted to practice in this Court." (*See*, Clerk's Letter, at E/R 13.) Appellant responded to the Clerk's Letter by filing an *Ex Parte* Application for Order Clarifying Status of Counsel, *Etc.*, whereby Appellant called to the attention of the District Court the fact that Appellant had previously been admitted to the bar of the District Court, and requested an order confirming that Appellant remained a member of the bar. (*See, Ex Parte* Application, at E/R 2-17.)

3. **Disposition in the District Court**

The District Court entered an order (*i.e.*, the Order on Appeal) which determined that Appellant had been

disbarred upon amendment to the District Court's Local Rule 1.5, which, as amended, purports to limit "continuing membership" to attorneys who are also members of the State Bar of Arizona. (*See*, Order on Appeal, at E/R 18-19.)

STATEMENT OF FACTS

Appellant is a member of, *inter alia*, four (4) state bars,[3] and has been admitted to practice before, and has practiced before, the United States Supreme Court,[4] three United States Courts of Appeals, and ***numerous*** United States District Courts. (*See*, *Ex Parte* Application, at E/R 3:2-10.) It is undisputed that Appellant is not now, nor has he ever been, a member of the State Bar of Arizona. (*See, Ex Parte* Application, at E/R 4:3.)

On 28 July 1995, Appellant was duly admitted as a member of the bar of the District Court. (*See*, Clerk's Certificate, at E/R 10.) As the District Court noted:

> "[Appellant] was admitted to practice before the bar of [the District court] . . . under then-Local Rule 1.5. Then-Local Rule 1.5 allowed nonresident attorneys to gain admission to practice based on their admission to the bar of a United States District Court."

(*See,* Order on Appeal at E/R 18:19½-21½.)

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[3] Including the plenary bar of the District of Columbia.

[4] Assuming unsuccessful petitions for certiorari constitute "practice" before the Supreme Court. *See, e.g., State of Kansas*, et al. *v. United States of America*, et al., 16 F.3d 436 (D.C. Cir. 1994), *certiorari denied*, 513 U.S. 945; 115 S.Ct. 354; 130 L.Ed.2d 309 (1994).

At all times from and after his admission to the bar of the District Court, Appellant duly reported his residence address and business address to the Clerk of the District Court. Such reports were in writing, and were transmitted via U.S. Certified Mail (Return Receipt Requested). (*See*, Report of Address Change, and Return Receipt for Certified Mail executed on behalf of the Clerk of the District Court, at E/R 11-12.)

In September of 1999, the District Court amended its Local Rule 1.5. As the District Court explained:

> "On September 15, 1999, the United States District Court for the District of Arizona formally adopted revised Local Rules, which contained substantial changes to Local Rule 1.5. Local Rule 1.5(a) now states in relevant part, '[a]dmission to and continuing membership in the bar of this Court is limited to attorneys who are active members in good standing of the State Bar of Arizona.' Similarly, Local Rule 1.5(b) also states, 'Except as herein otherwise provided, only members of the bar of this Court shall practice in this District.'"

(*See*, Order on Appeal at E/R 18:21½-27½; *see also*, General Order No. 99-15, **hereinafter the "Amendment Order"**, reproduced at E/R 1.)

In or about May of 2000, Appellant was retained by numerous individuals to represent them as plaintiffs in a civil action for recovery of damages involving the collapse of a Five Hundred Million Dollar ($500,000,000.00) Ponzi scheme which had operated under the name, "Baptist Foundation of Arizona." (*See*, *Ex Parte* Application, at E/R 4:4-6.) Appellant determined that venue of the then-proposed civil action was properly fixed within the District

of Arizona, by operation of Title 28, U.S.C., Sections 1391(b), 1391(c), and 1409(a). (*See*, *Ex Parte* Application, at E/R 4:7-8.) Upon making such determination, and prior to commencement of the underlying civil action, Appellant reviewed the Local Rules of the District Court, and noted the above-referenced amendments to Local Rule 1.5(a). (*See, Ex Parte* Application, at E/R 4:9-11.) Based upon the constitutional principles discussed *infra*, Appellant determined that the amendments to Local Rule 1.5(a) could not have been intended to terminate Appellant's license to practice before the District Court, and that Appellant's license to practice before the District Court remained extant. (*See*, *Ex Parte* Application, at E/R 4:12-14.) Believing that he was licensed to practice before the District Court, Appellant participated in the filing of the underlying civil action, wherein Appellant served as co-counsel of record. (*See*, *Ex Parte* Application, at E/R 4:15-16.)

On or about 1 September 2000, Appellant received a letter **(hereinafter the "Clerk's Letter")** from the Clerk of the District Court which stated, *inter alia:*

> "Your name has appeared on pleadings filed with this court; however a review of our files indicates that you have not been admitted to practice in this Court."

(*See*, Clerk's Letter, at E/R 13.) The Clerk's Letter warned Appellant that if Appellant failed to apply by 29 September 2000 for admission *pro hac vice*, Appellant would " . . . be removed as counsel of record," and that filing of additional pleadings in the absence of admission " . . . could . . . subject [Appellant] to sanctions . . . " (*See*, Clerk's Letter, at E/R 13.)

At no time prior to Appellant's receipt of the Clerk's Letter (*i.e.*, at no time prior to 1 September 2000) did Appellant receive notice that the District Court was considering entry of the Amendment Order, or that the District Court might interpret the amended Local Rule 1.5 (a) as operating to terminate Appellant's licence to practice before the District Court. (*See*, *Ex Parte* Application, at E/R 4:23½ to 5:1.)

In response to the Clerk's Letter, Appellant promptly filed his *Ex Parte* Application for Order Clarifying Status of Counsel, or, Alternatively, for Order *Nunc Pro Tunc* Granting Admission *Pro Hac Vice*. (*See*, *Ex Parte* Application, reproduced at E/R 2-17.)

In considering Appellant's *Ex Parte* Application, the District Court correctly noted that Appellant had not been the subject of any disciplinary action, or even of any complaint. (*See*, Order on Appeal, at E/R 19:13-17.) However, the District Court held that Appellant had been disbarred by the amendment to Local Rule 1.5. (*See*, Order on Appeal, at E/R 18-19.) The District Court implied that, because Appellant remained free to apply for admission *pro hac vice*, Appellant had assertedly not been harmed by the disbarment, and thus was not entitled to notice and an opportunity to be heard prior to entry of the order effecting the disbarment. (*See*, Order on Appeal, at E/R 19:13-17.) The District Court required that Appellant pay a $25.00 application fee as a prerequisite to admission *pro hac vice*. (*See*, Order on Appeal, at E/R 19:22.)

STATEMENT OF THE STANDARD OF REVIEW

The Order on Appeal is based entirely upon conclusions of law, and is thus reviewed *de novo*. *See*, *Matter of*

McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984) (*en banc*), noting that United States Courts of Appeals conduct *de novo* review of district courts' conclusions of law.

To the extent this Court may elect to utilize its supervisory power so as to avoid consideration of constitutional issues, this Court has plenary power to invalidate in whole or in part the District Court's Local Rule 1.5, so as to ensure that the Local Rules of the District Court are consistent with " . . . the principles of right and justice." *See*, *Frazier v. Heebe*, 482 U.S. 641, 645; 107 S.Ct. 2607, 2611; 96 L.Ed.2d 557 (1987) (citation, internal quotation marks, and attribution omitted), wherein the Supreme Court utilized its supervisory power to invalidate a local rule, and thereby obviated the necessity of addressing a constitutional question.

SUMMARY OF THE ARGUMENT

Appellant is an officer of the District Court who, like the Judges of the District Court, holds his office during good behavior. Once admitted to practice, an attorney may not be discharged from his or her life-tenured office except upon judgment of misconduct or unfitness, entered after full due process has been afforded the attorney. The requisite due process includes, at a minimum, advance notice by mail of the proceedings wherein the order effecting disbarment is to be entered, notice of the precise nature of the charges, and an opportunity to be heard in defense against those charges.

In the case at bar, the District Court purported to disbar Appellant, and presumably many other licensed attorneys, in the absence of just cause, in the absence of

notice of the proceedings, and in the absence of even notice *ex post facto*.

This Court should, if fairly possible, interpret the District Court's Local Rule 1.5 to operate prospectively (so as to have no effect upon the licenses of attorneys admitted prior to the effective date of the amendment). If this Court cannot do so, this Court should utilize its supervisory power to modify the operation of the District Court's Local Rule 1.5 to operate prospectively. If necessary, this Court should hold that the District Court's Local Rule 1.5 is unconstitutional as applied to attorneys admitted prior to the effective date of the amendment who are not members of the State Bar of Arizona.

ARGUMENT

I. APPELLANT'S OFFICE, LIKE THE OFFICES OF THE MEMBERS OF THE ARTICLE III JUDICIARY, IS LIFE-TENURED DURING GOOD BEHAVIOR

Appellant does not question the power of a United States District Court to require admission to the bar of its forum state as a prerequisite to admission to practice before it. *See*, *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990). The primary questions presented by the instant Appeal are: (a) whether a District Court may disbar licensed attorneys by requiring -- through a local rule adopted ***subsequent to*** the attorney's admission to practice – membership in the state bar of its forum state, and (b) if so, whether the disbarment may be effected without notice to the disbarred attorneys. The instant Part I of the Argument addresses the first of these two questions.

Article III, Section 1, of the United States Constitution provides, *inter alia*:

> "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . ."

(*See*, U.S. Const., Art. III, § 1.) "The 'good Behavior' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment." *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50, 59; 102 S.Ct. 2858, 2865; 73 L.Ed.2d 598 (1982). (Citation omitted.)

Attorneys licensed to practice before courts of the United States, like members of the Article III judiciary, hold their offices during "good behavior". As the Supreme Court has held, such attorneys are:

> " . . . officers of the court . . . ***[who] 'hold their office during good behavior, and can only be deprived of it for misconduct . . .'***"

Ex Parte Robinson, 86 U.S. 505, 512; 22 L.Ed. 205; 19 Wallace 505 (1873), *quoting*, *Ex Parte Garland*, 71 U.S. 333, 378; 18 L.Ed. 366; 4 Wallace 378 (1866). (Emphasis added.)[5] Although there is no requirement that attorney

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[5] It is axiomatic that all decisions of the Supreme Court remain binding upon this Court in the absence of subsequent authority to the contrary. As one Fifth Circuit panel wrote: "Mere age does not weaken the strength of an opinion. Nor, obviously, can it reduce the scope of constitutional protection." *City of Houston v. Federal Aviation Administration*, 679 F.2d 1184, 1197 (5th Cir. 1982). *See also*, *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.2d 692, 704 (1999), *vacated on other grounds*, 220 F.3d 1134, 1140 (9th Cir.2000) (*en banc*), *cert. denied*, 531 U.S. 1143, 121 S.Ct. 1078, 148 L.Ed.2d 955 (2001).

(Continued on following page)

misconduct must be established upon impeachment, the Supreme Court has held that the power to terminate a license to practice before a United States District Court:

> " . . . can only be exercised where there has been such conduct on the part of the parties complained of as shows them to be unfit to be members of the profession."

Ex Parte Robinson, 86 U.S. at 512.

> "The attorney and counsellor being, by the solemn judicial act of the court, ***clothed with his [or her] office, does not hold it as a matter of grace and favor***. The right which it confers upon him [or her] to appear for [litigants], and to argue causes, is something ***more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature***. It is a right of which he [or she] can only be deprived by the judgment of the court, for moral or professional delinquency."

Ex Parte Garland, 71 U.S. at 379. (Emphasis added.)

The Supreme Court has even held that, where one of the requirements for admission to practice before a federal court was (at the time of admission) membership in the bar of a state court, such requirement is:

> " . . . exhausted upon admission to [the federal bar] which [the state bar membership] has served to secure . . . [such that "loss" of the state

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(Referring to older decisions of the Supreme Court as: " . . . remain[ing] on the books and . . . binding on lower courts . . . [This Court is] not at liberty to ignore them.")

> law license] . . . by any . . . cause not involving unworthiness [*i.e.*, misconduct], . . . would be wholly negligible upon the right to continue to be a member of the [federal] bar . . ."

Snelling v. Radford, 243 U.S. 46, 49; 37 S.Ct. 377, 378 (1917). Thus, attorneys who are members of the State Bar of Arizona who are today admitted under the current version of the District Court's Local Rule 1.5 are free to permit their Arizona law licenses to lapse (*e.g.*, for non-payment of dues), without placing at risk their licenses to practice before the District Court.

In the case at bar, Appellant possessed all qualifications for admission to the bar of the District Court at the time he was duly admitted to said bar. Appellant holds his office during good behavior, and his license to practice before the District Court cannot be terminated in the absence of misconduct.

II. THE DISTRICT COURT ERRED IN ENTERING AN ORDER WHICH PURPORTED TO DISBAR APPELLANT WITHOUT AFFORDING APPELLANT NOTICE OF THE PROCEEDINGS AND AN OPPORTUNITY TO BE HEARD

The instant Part II of the Argument establishes that disbarment may ***never*** be effected in the absence of notice to the disbarred attorneys.

Disbarment proceedings " . . . are adversary proceedings of a quasi-criminal nature." *In the Matter of: Ruffalo*, 390 U.S. 544, 551; 88 S.Ct. 1222, 1226; 20 L.Ed.2d 117 (1968). (Citations omitted.)

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the

> lawyer. . . . He [or she] is accordingly entitled to procedural due process, which includes fair ***notice*** of the charge."

In the Matter of: Ruffalo, 390 U.S. at 550; 88 S.Ct. at 1226. (Emphasis added; citations omitted.)[6] A license to practice before a United States District Court may only be terminated upon a judicial determination of misconduct, rendered " . . . after ***opportunity to be heard*** has been afforded." *Ex Parte Robinson*, 86 U.S. at 512. (Emphasis added.)

The Supreme Court has held that, prior to entry of any order effecting disbarment, an attorney must be afforded the same due process rights of notice and an opportunity to be heard which must be afforded a litigant prior to deprivation of a property interest:

> "Before a judgment disbarring an attorney is rendered he [or she] should have ***notice*** of the grounds of complaint against him [or her] and ample ***opportunity of explanation and defence***. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him [or her] of his [or her] right to practice his [or her] profession, as when they are taken to reach his [or her] ***real or personal property***."

Ex Parte Robinson, 86 U.S. at 512. (Emphasis added.)[7]

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[6] *See also*, concurring opinion of Justice Harlan at 390 U.S. 552; 88 S.Ct. 1227.

[7] Other courts have more explicitly held that a license to practice law is a property interest protected by the Due Process Clause. *See, e.g., Conway v. State Bar of California* (1989), 47 Cal.3d 1107, 1113; 255

(Continued on following page)

Due process requires that the attorney be afforded " . . . fair notice as to the ***reach*** of the [proceedings resulting in disbarment] and [***also*** of] the ***precise nature of the charges*** . . ." *In the Matter of: Ruffalo*, 390 U.S. at 552; 88 S.Ct. at 1226. (Emphasis added.)

Notice by ordinary U.S. mail is the minimum notice required to afford due process where, as here, the mailing address of the person to be affected is ascertainable. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318; 70 S.Ct. 652, 659; 94 L.Ed.2d 865 (1950).

In the case at bar, at the time the Judges of the District Court issued their Amendment Order which, *inter alia*, amended Local Rule 1.5, the Clerk of the District Court had Appellant's name and address (and also the names and addresses of numerous other licensed attorneys situated similarly to Appellant). Nevertheless, Appellant was afforded no notice whatsoever that the Judges were considering entry of the Amendment Order which (according to the District Court below) had the effect of disbarring Appellant. (Presumably, no notice was afforded any of the other licensed attorneys situated similarly to Appellant). Even more troubling, Appellant was afforded absolutely no notice when the Clerk of the District Court struck Appellant's name from the membership roll of the District Court's bar. (Presumably, no notice was afforded any of the other similarly-situated attorneys, many of whom, as of

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Cal.Rptr. 390, 393; 767 P.2d 657, 660 (license to practice law), *citing*, *Barry v. Barchi*, 443 U.S. 55, 64; 99 S.Ct. 2642, 2649; 61 L.Ed.2d 365 (1979) (the latter holding that the holder of a license to train horses had "a property interest in his license sufficient to invoke the protection of the Due Process Clause").

this date ***may not even be aware that they have been disbarred***.) This absence of notice, standing alone, renders the amendment to Local Rule 1.5 unconstitutional as applied to Appellant, and as to all other attorneys admitted to practice prior to the effective date of the Amendment Order (*i.e.*, prior to 15 September 1999).

III. THIS COURT SHOULD, IF FAIRLY POSSIBLE, CONSTRUE LOCAL RULE 1.5 IN SUCH MANNER AS WOULD PRESERVE ITS CONSTITUTIONALITY; ALTERNATIVELY, THIS COURT SHOULD UTILIZE ITS SUPERVISORY POWER TO MODIFY LOCAL RULE 1.5; IN EITHER CASE, THIS COURT SHOULD DIRECT THE DISTRICT COURT TO RESTORE THE *STATUS QUO ANTE* BY RESTORING APPELLANT'S NAME TO THE ROLL OF LICENSED ATTORNEYS, AND BY TAKING OTHER APPROPRIATE CURATIVE ACTION

The Supreme Court has adopted the prudential rule that a federal court should avoid addressing constitutional questions where not necessary to the disposition of the case or controversy before it. *See*, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 7-8; 113 S.Ct. 2462, 2465-2466; 125 L.Ed.2d 1 (1993). For example, where possible, an Act of Congress will be construed, if "fairly possible", so as to avoid the necessity for resolution of any constitutional question. *Zobrest*, 509 U.S. at 7; 113 S.Ct. at 2465. *See also*, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369; 91 S.Ct. 1400, 1404-1405; 28 L.Ed.2d 822 (1971).

In the case at bar, Appellant requested that the District Court interpret the amended Local Rule 1.5 as applicable only to new admissions occurring subsequent to

the effective date of the Amendment Order. (*See*, *Ex Parte* Application, at E/R 6:7 to 7:12.) The District Court refused to so interpret the Amendment Order. (*See*, order on Appeal, *passim*, reproduced at E/R 18-19.)[8]

This Court is not bound by the District Court's interpretation of the District Court's prior order. *See, Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134, 141; 60 S.CT. 437, 440; 84 L.Ed. 656 (1940). ("Nor is a court's interpretation of the scope of its own mandate necessarily conclusive.") Accordingly, this Court is free to consider whether Local Rule 1.5, as amended, purports to disbar attorneys who are not members of the State Bar of Arizona, but who were admitted to practice before the District Court prior to the effective date of the Amendment Order.

Alternatively, if this Court concurs in the District Court's interpretation of Local Rule 1.5, as amended, then this Court may utilize its supervisory power to direct the District Court to limit the application of the Local Rule 1.5, as amended, to prospective admissions to the bar of the District Court. Such a limitation could be effected by simply striking the words, "and continuing membership in", from the first sentence of Local Rule 1.5.

CONCLUSION

This Court's ruling in the case at bar should be broad in scope, so as to restore the licenses of all attorneys

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[8] The District Court was not alone in so interpreting Local Rule 1.5, as amended. Recall that the Clerk of the District Court had previously stricken Appellant's name from the District Court's roll of licensed attorneys.

purportedly disbarred by the Amendment Order. This Court should direct the District Court to order the Clerk of the District Court to restore to its roll of licensed attorneys all counsel whose names were previously stricken therefrom as a result of the Amendment Order. This Court should direct the District Court to order the Clerk of the District Court to provide written notice to all attorneys whose names were previously stricken that their names had been stricken from the roll, but that, pursuant to order of this Court, their names have been restored to the roll. This Court should also publish its decision in this case, to ensure that notice of the reinstatement is made available to those attorneys who previously learned that they had been disbarred, and who thereafter believed they had no reason to notify the Clerk of the District Court of their current mailing addresses. Finally, this Court should notify each active Judge of the District Court of its decision in this case, so that such Judges will be aware that attorneys previously disbarred by operation of the Amendment Order are authorized to practice before the District Court.

Dated: 19 February 2002 Respectfully submitted,

DAVID J. GALLO, ESQ.
12702 VIA CORTINA, SUITE 500
DEL MAR, CALIFORNIA
92014-3769
Telephone: (858) 509-3652

/s/ David J. Gallo
By: David J. Gallo,
California Bar No. 127722,
Movant-Appellant,
in propria persona

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOMMIE L. BARTLETT, et al., Plaintiffs, -v- ARTHUR ANDERSEN, L.L.P., etc. et al., Defendants.	Docket Number 01-17332
DAVID J. GALLO, Movant-Appellant, -v- UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, Real Party in Interest.	

SUPPLEMENT TO RECORD

Daniel J. McAuliffe
Andrew M. Jacobs
SNELL & WILMER LLP
One Arizona Center
Phoenix, Arizona 85004-2202
(602) 382-6272

UNITED STATES DISTRICT COURT [SEAL]
District of Arizona
OFFICE OF THE CLERK

MEMORANDUM

DATE: February 7, 2003

TO: Daniel J. McAuliffe, Esq.

FROM: Richard H. Weare, District Court Executive and Clerk of Court [/s/ Richard H. Weare]

RE: Establishment of *Pro Hac Vice* Requirement

In response to your request for information relating to the establishment of a *pro hac vice* requirement in this district, particularly as it relates to attorney David J. Gallo, I offer the following:

- David J. Gallo was admitted to practice in the District of Arizona on July 28, 1995, based solely on his status as an attorney admitted to practice in the Northern District of Texas. At that time, Local Rule 1.5 (c) (*attachment 1*) allowed for any member in good standing of the bar of any Federal Court, and who neither resides nor maintains an office for the practice of law in the district of Arizona, to be admitted to practice in this District upon appropriate application, completion of the oath upon admission, and payment of an admission fee of fifty dollars ($50) to the Clerk, U. S. District Court. Attached is a copy of Mr. Gallo's application for admission (*attachment 2*) and certificate of admission (*attachment 3*).

- On September 15, 1999, Local rule 1.5 (*attachment 4*) was amended to establish a *pro hac vice* provision that pertains to all attorneys

for whom one or more of the following apply (1) the attorney does not reside in Arizona, (ii) the attorney is not regularly employed in Arizona, or (iii) the attorney is not regularly engaged in the practice of law in Arizona.

- In response to the amendment to Local Rule 1.5, this office determined that 6,796 out-of-state attorneys were affected by the change – the vast majority of whom were not actively practicing in this district court. Because the issuance of separate notices to all affected attorneys would pose an unreasonable administrative hardship on this office, this office instead attempted to publicize the rule change in a way that would effect timely notice to those lawyers who were actively practicing in this district and/or who otherwise stayed abreast of local rule activity in this district.

  Specifically, the following actions were taken immediately following the adoption of the amended local rules in September 1999:

  1. Notice of the local rule amendments was prominently posted on the court's website at www.azd.uscourts.gov. In addition, a summary (*attachment 5*) was posted on the website to assist lawyers in identifying specific changes to the rules. These postings appeared for approximately six months or more.

  2. A notice advising of the change to Local Rule 1.5 (*attachment 6*) was prominently posted and made available in the Customer Services/Intake area of the Clerk's Offices in the Phoenix and Tucson divisions. This same notice was mailed to

any out-of-state attorney admitted prior to 9/15/99, who made a new appearance and/or requested a certificate of good standing. These activities occurred for a period of approximately three months.

3. For a period of approximately three months or more, a special notice (*attachment 7*) appeared at the foot of the cover sheet used to transmit all orders and judgments issued in any civil or criminal case via facsimile to counsel of record.

4. Clerk's Office representatives made a presentation at a Federal Bar Association luncheon in Phoenix in January 2000 during which the changes to the local rules were reviewed.

- At an administrative meeting of the court in October 1999, the district judges determined that it was appropriate to establish a grace period for those out-of-state attorneys who had been admitted to practice in Arizona, but had not yet made an appearance. They directed the Clerk as follows:

> *Any out of state attorney admitted to practice before the Bar of this Court between September 15, 1998 and September 14, 1999, and who has made no appearances in this court during that time frame, will be granted one pro hac vice appearance without payment of the fee. Any subsequent appearances by that attorney will be subject to the $25 pro hac vice fee under the provisions of Local Rule 1.5(b)(1)(3).*

- Our records indicate that Mr. Gallo's first appearance in a case in this district was on May 8, 2000, as co-counsel of record for the plaintiff in CIV 00-852-PHX-SMM.
- On August 30, 2000, the attorney admissions clerk sent a letter to Mr. Gallo advising of the court's *pro hac vice* requirement (*attachment 8*). Mr. Gallo responded with an "*ex parte* application for order clarifying status of counsel, or, alternatively, for order *nunc pro tunc* granting admission *pro hac vice*" (*attachment 9*), along with a proposed order (*attachment 10*).
- On October 2, 2000, this office filed an order by Judge Stephen M. McNamee (*attachment 11*) denying Mr. Gallo's application and, having already received a *pro hac vice* application, directed him to submit the $25.00 fee for *pro hac vice* admission. On October 17, 2002, this office deposited Mr. Gallo's $25.00 *pro hac vice* admission fee and issued a receipt to him (*attachment 12*).

I hope this information is helpful. If I can be of any further assistance, please feel free to contact my office.

Attachments – copies of:

1. Local Rule 1.5 dated January 1994.
2. Mr. Gallo's 1995 application for admission.
3. Mr. Gallo's 1995 certificate of admission
4. Local Rule 1.5 dated September 15, 1999.
5. Summary of rule changes as posted on court's website.
6. Notice re change to Local Rule 1.5.

7. Facsimile notice to counsel re rule changes (sample)
8. Letter to Mr. Gallo re admission status.
9. Mr. Gallo's *ex parte* application.
10. Mr. Gallo's proposed order.
11. Order denying Mr. Gallo's application.
12. Receipt for *pro hac vice* fee.

cc. Chief Judge Stephen M. McNamee

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA
230 N. First Avenue
Room 6077
Phoenix, Arizona 85025

Stephen M. McNamee
United States District Judge

Telephone: (602) 514-7016
Fax: (602) 514-7173

May 19, 1999

NOTICE OF HEARING

In accordance with Rule 1.18 of the Rules of Practice of the United States District Court for the District of Arizona (hereafter "Local Rules"), a public hearing on the proposed amendments to the Local Rules will be held on Monday, July 12, 1999, at 9:00 a.m. before the Honorable Stephen M. McNamee at the United States Courthouse in Phoenix and at 3:30 p.m. before the Honorable John M. Roll at the James A. Walsh Courthouse in Tucson.

The proposed amendments to the Local Rules are available at the District of Arizona Web site located at www.azd.uscourts.gov under the topic of "1999 Local Rules Amendment."

/s/ Stephen M. McNamee
Honorable Stephen M. McNamee
United States District Judge
Chair, Local Rules Committee